

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matters of

International Comparison and Consumer Survey
Requirements in the Broadband Data Improvement
Act

GN Docket No. 09-47

A National Broadband Plan for Our Future

GN Docket No. 09-51

Inquiry Concerning the Deployment of Advanced
Telecommunications Capability to All Americans
in a Reasonable and Timely Fashion, and Possible
Steps to Accelerate Such Deployment Pursuant to
Section 706 of the Telecommunications Act of
1996, as Amended by the Broadband Data
Improvement Act

GN Docket No. 09-137

Consumer Information and Disclosure

CG Docket No. 09-158

Truth-in-Billing and Billing Format

CC Docket No. 98-170

IP-Enabled Services

WC Docket No. 04-36

Comment Sought on Transition from Circuit-
Switched Network to All-IP Network

NBP Public Notice #25

**COMMENTS OF
THE MASSACHUSETTS DEPARTMENT OF
TELECOMMUNICATIONS AND CABLE**

Commonwealth of Massachusetts
Department of Telecommunications and Cable

Geoffrey G. Why, Commissioner

Two South Station, 4th Floor
Boston, MA 02110
(617) 305-3500

Dated: December 21, 2009

I. INTRODUCTION

The Massachusetts Department of Telecommunications and Cable (“MDTC”)¹ respectfully submits these comments pursuant to the Public Notice issued by the Federal Communications Commission (“FCC” or “Commission”) on December 1, 2009, in the above captioned proceedings.² The Commission specifies that “[t]he intent of this Public Notice is to set the stage for the Commission to consider whether to issue a Notice of Inquiry (“NOI”) relating to the appropriate policy framework to facilitate and respond to market-led transition in technology and services, from the circuit-switched PSTN system to an IP-based communications world” and, subsequently, seeks “public comment to identify the relevant policy questions” that an NOI should raise concerning the transition from a circuit-switched to IP-based world.³ The MDTC believes that it is necessary for the Commission to address the “transition” through a comprehensive proceeding. There are many issues that would need to be addressed in such an investigation, including the jurisdictional and regulatory classification of facilities-based VoIP services. The MDTC believes that this is an important issue that greatly affects consumers. Therefore, the MDTC reaffirms its legal arguments and position that states are not preempted from regulating facilities-based VoIP,⁴ since states are uniquely situated, equipped and staffed to

¹ The MDTC is the exclusive state regulator of telecommunications and cable services within the Commonwealth of Massachusetts. See Mass.Gen.Laws c. 25C, § 1.

² See *In the Matters of International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act*, GN Docket No. 09-47, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 09-137, Public Notice, DA 09-2517, (rel. Dec. 1, 2009) (“Public Notice”).

³ Public Notice at 1-2.

⁴ See generally, MDTC Ex Parte Comments, *In the Matters of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Universal Service Contribution Methodology*, WC Docket No. 06-122, *IP-Enabled Services*, WC Docket No. 04-36, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (filed Oct. 27, 2008) (“MDTC 2008 Ex Parte Comments”); MDTC Comments, *In the Matters of High-Cost*

regulate intrastate communications. However, the MDTC welcomes this opportunity to comment further and provides the following recommendations based upon its own experiences as a regulator with regard to facilities-based VoIP communications.

II. DISCUSSION

1. Pending final Commission determination as to the appropriate regulatory classification of such services, the Commission must reaffirm state authority to regulate intrastate facilities-based VoIP providers

In 2004, the Commission issued the *Vonage Order* in which it preempted certain state regulation of nomadic VoIP services.⁵ According to a later Commission order, however, the preemptive effects of the *Vonage Order* would no longer apply once carriers could determine the jurisdictional confines of a nomadic VoIP telephone call.⁶ The Commission has never

Universal Service Support, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link Up*, WC Docket No. 03-109, *Universal Service Contribution Methodology*, WC Docket No. 06-122, *Numbering Resource Optimization*, CC Docket No. 99-200, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, *IP-Enabled Services*, WC Docket No. 04-36, at 9-16 (filed Nov. 26, 2008); MDTC Reply Comments, *In the Matters of High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link Up*, WC Docket No. 03-109, *Universal Service Contribution Methodology*, WC Docket No. 06-122, *Numbering Resource Optimization*, CC Docket No. 99-200, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, *IP-Enabled Services*, WC Docket No. 04-36 (filed Dec. 22, 2008); MDTC Reply Comments, *In the Matter of Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rules Allowing State Universal Service Funds to Assess Charges on Nomadic Voice Over Internet Protocol Intrastate Revenues*, WC Docket No. 06-122 (filed Sept. 24, 2009).

⁵ See *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 (rel. Nov. 12, 2004) (“*Vonage Order*”), *aff’d sub nom. Minnesota Pub. Utils. Comm’n v. FCC*, 483 F.3d 570 (8th Cir. 2007) (concluding that state regulation of fixed, or facilities-based, VoIP services “remains an open issue”).

⁶ *In the Matters of Universal Service Contribution Methodology*, WC Docket No. 06-122, *Federal-State Joint Board on Universal Service, etc.*, CC Docket No. 96-45, Report and Order and Notice of Proposed Rulemaking, FCC 06-94, at ¶ 56 (rel. Jun. 27, 2006) (specifying that “VoIP providers[s] with a capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the *Vonage Order* [the inseparability of inter- and intrastate calls] would no longer be applicable[.]”) (“*USF Contribution Order*”), *aff’d in part, vacated in part sub nom. Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C.

preempted state authority over facilities-based VoIP services, nor has it ever made a final determination as to whether interconnected VoIP services qualify as telecommunications or information services.⁷ However, despite this lack of classification, citing consumer expectations, the Commission has consistently extended traditional Title II common carrier requirements to interconnected VoIP providers since 2004.⁸

State activities towards the appropriate regulatory treatment of VoIP services in the Commission's stead have been varied.⁹ Some state commissions deemed it prudent to await final Commission determination before addressing the issue.¹⁰ In certain of these instances, the

Cir. 2007) (affirming Commission requirement that interconnected VoIP providers contribute to the Universal Service Fund).

⁷ See e.g., *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Report and Order, FCC 09-40, at n.21 (rel. May 13, 2009) (stating that "[t]he Commission to date has not classified interconnected VoIP service as a telecommunications service or information service as those terms are defined in the Act, and we do not make that determination today") (*"VoIP Discontinuance Order"*); *In the Matter of Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Report and Order and Further Notice of Proposed Rulemaking, FCC 09-105, at ¶ 12 (rel. Dec. 2, 2009) (noting that "the Commission has not yet classified interconnected VoIP service as either a telecommunications service or an information service").

⁸ See e.g., *USF Contribution Order*, at ¶¶ 35, 46-49; *VoIP Discontinuance Order*, at ¶¶ 9-12. See also, *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, First Report and Order and Further Notice of Proposed Rulemaking, FCC 05-153, ¶¶ 8-10 (rel. Sept. 23, 2005) (determining that the "telecommunications carrier" definition in CALEA includes facilities-based broadband Internet access and interconnected VoIP providers under that Substantial Replacement Provision of that Act) (*"CALEA Order"*), *aff'd sub nom. American Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006).

⁹ This discussion does not address state treatment of VoIP services as it relates to state E-911 and universal service fund requirements, nor does it consider the multitude of interconnection and access charge disputes brought to state commissions for resolution.

¹⁰ See e.g., California Public Utilities Commission, *Investigation on the Commission's Own Motion to Determine the Extent to Which the Public Utility Telephone Service known as Voice over Internet Protocol Should Be Exempted from Regulatory Requirements*, Investigation 04-02-007, Opinion Closing Proceeding, at 3 (dated June 15, 2006), available at: http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/57182.pdf (last viewed Dec. 21, 2009) (*"California PUC Opinion"*); Colorado Public Utilities Commission, *In the Matter of the Investigation into Voice Over Internet Protocol (VoIP) Services*, Docket No. 03M-220T, Order Closing Docket, at ¶ 3 (adopted Dec. 17, 2003), available at: http://www.dora.state.co.us/puc/DocketsDecisions/decisions/2004/C04-0004_03M-220T.doc (last viewed Dec. 21, 2009) (*"Colorado PUC Order"*); Pennsylvania Public Utility Commission, *Investigation into Voice Over Internet Protocol as a Jurisdictional Service*, Docket No. M-00031707, Order, at 4, 14-15 (entered May 24, 2004), available at: <http://www.puc.state.pa.us/PcDocs/471346.doc> (last viewed Dec. 21, 2009) (*"Pennsylvania PUC Order"*); Wisconsin Public Service Commission, *Petition of AT&T Wisconsin for Declaratory Ruling that its "U-verse Voice" Service is Subject to Exclusive Federal Jurisdiction*, Docket No. 6720-DR-101, Temporary Order Deferring Decision, at 3-4 (dated Sept. 17, 2009), available at:

state commissions indicated an expectation that the FCC would soon decide the issue.¹¹ Other state commissions have been expressly prohibited from regulating VoIP services by their legislatures.¹² However, in the past two years, as an increasing number of companies have transitioned to the VoIP platform to provide telephone service, several state commissions have initiated proceedings to determine the appropriate treatment of those services within their respective states.¹³ In fact, on December 10, 2009, the Hearing Officer for the VoIP proceeding in Vermont issued a recommended decision indicating that the telephone service provided by Comcast IP Phone, and any like service, qualified as a telecommunications service under state statute and, therefore, those services were subject to the state commission's jurisdiction.¹⁴

Similarly, in Massachusetts, the MDTC has determined that facilities-based VoIP service providers satisfy the state's common carrier test and, therefore, are subject to the MDTC's telecommunications service provider requirements.¹⁵ The MDTC's requirements do not include

http://psc.wi.gov/apps35/ERF_view/viewdoc.aspx?docid=120161 (last viewed Dec. 21, 2009) ("Wisconsin PSC Temporary Order").

¹¹ See e.g., *California PUC Opinion*, at 3; *Wisconsin PSC Temporary Order*, at 3-4.

¹² See e.g., Ala.Code 1975 § 37-2A-4(a) (2009); 26 Del.C. § 202(i) (2007); DC ST § 34-403 (2008); Fl. Stat. Ann. § 364.01 (2003); Ga. Code Ann. § 46-5-202 (2006).

¹³ See e.g., Louisiana Public Service Commission, *In re: Rulemaking to study the possible development of rules applicable to Voice over Internet Protocol (VoIP)*, Docket No. R-28268 (docket refreshed on July 24, 2009); Maine Public Utilities Commission, *Investigation into Whether Providers of Time Warner "Digital Phone" Service and Comcast "Digital Voice" Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service*, Docket No. 2008-421, (opened Oct. 21, 2008), final order pending; New Hampshire Public Utilities Commission, *Petition for an Investigation into the Regulatory Status of IP Enabled Voice Telecommunications Services*, Docket No. 09-044, (opened May 6, 2009); Texas Public Utility Commission, *Rulemaking Related to the Regulatory Treatment of Voice Over Internet Protocol Services*, Docket No. 37614, (opened Oct. 22, 2009); Vermont Public Service Board, *Investigation into regulation of Voice over Internet Protocol ("VoIP") services*, Docket No. 7316, (opened May 16, 2007).

¹⁴ Vermont Public Service Board, *Investigation into regulation of Voice over Internet Protocol ("VoIP") services*, Docket No. 7316, Hearing Officer Proposal for Decision (dated Dec. 8, 2009). This decision is provided as MDTC Comments Attachment No. 1.

¹⁵ See e.g., Letter from Michael A. Isenberg, Director, Competition Division, Massachusetts Department of Telecommunications and Cable, to Stacey L. Parker, Senior Director, Regulatory Affairs, Comcast (Nov. 14, 2008); Letter from Michael A. Isenberg, Director, Competition Division, Massachusetts Department of Telecommunications and Cable, to John L. Conroy, Vice President, Regulatory Massachusetts, Verizon (Sept. 22,

rate regulation.¹⁶ Instead, the MDTC requires that all telecommunications service providers: (1) file a statement of business operations as registration;¹⁷ (2) keep a tariff on file listing the intrastate services being provided; and (3) for services provided to residential customers, comply with the MDTC's billing and termination rules.¹⁸ These requirements ensure a minimal level of oversight of providers by the MDTC and a basic set of consumer protections.

As states have grappled with the appropriate treatment of VoIP services, certain facilities-based VoIP providers have asserted that states do not have regulatory authority over them. This is the case in Massachusetts where facilities-based VoIP services are available to approximately 97% of residential households.¹⁹ Despite the MDTC's determinations to the contrary, certain providers that have or soon will be transitioning their circuit-switched systems to IP-based systems, including Verizon, the statewide incumbent local exchange carrier ("ILEC"), have

2009). MDTC communications with all carriers on this issue, including Braintree Electric Light Department, Charter Communications, Comcast, Norwood Light Department, RCN Telecom Services, Shrewsbury Electric and Cable Operations, Time Warner Cable, and Verizon, are available through the MDTC's website at: <http://www.mass.gov/?pageID=ocasubtopic&L=8&L0=Home&L1=Government&L2=Our+Agencies+and+Division&L3=Department+of+Telecommunications+and+Cable&L4=Competition+Division&L5=Telecommunications+Division&L6=Telecom+Statutes%2c+Rules%2c+and+Notices&L7=Correspondence+with+Fixed+VoIP+Providers&sid=Eoca>. These communications are also provided as MDTC Comments Attachment No. 2.

¹⁶ In fact, the MDTC regulates only the ILEC basic residential rates. *See Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts*, Docket No. D.T.E. 01-31-Phase II, Final Order (issued Apr. 11, 2003). With minimal exception, all other intrastate telephone rates in Massachusetts, including those of competitive carriers, are subject to market-based pricing.

¹⁷ The Massachusetts legislature recently reinforced this requirement in the state's E-911 statute, whereby all communications providers, including interconnected VoIP providers, are required to register with the MDTC. *See* Chapter 223 of the Acts of 2008, § 8(e); Mass. Gen. Laws c. 6A, § 18H(e).

¹⁸ *See e.g.*, MDTC Checklist for Registration and Tariff Filings, MDTC Market Entry page, available at: <http://www.mass.gov/?pageID=ocasubtopic&L=8&L0=Home&L1=Government&L2=Our+Agencies+and+Division&L3=Department+of+Telecommunications+and+Cable&L4=Competition+Division&L5=Telecommunications+Division&L6=Doing+Business+in+Massachusetts&L7=Market+Entry&sid=Eoca>.

¹⁹ *See* MDTC 2008 Ex Parte Comments, at 2.

unilaterally declared to the MDTC that they are not subject to state regulation.²⁰ However, these providers have stated that they will voluntarily comply with certain of the MDTC's billing and termination rules for the time being.²¹

Until recently, the Commission offered little guidance to states with regard to state treatment of interconnected VoIP services, and this has resulted in increased regulatory uncertainty and disparate treatment for carriers nationwide. On October 9, 2009, however, the Wireline Competition Bureau ("WCB") released a decision involving a state interconnection arbitration dispute that departed from this trend.²² This WCB decision clearly indicated that states need not await Commission action with regard to VoIP issues and, instead, may rely on "existing law."²³ Pending a Commission final determination as to the appropriate classification of interconnected VoIP services, the Commission needs to reaffirm this position as it applies to state regulatory treatment over these services overall. This guidance will help to eliminate some of the regulatory uncertainty that has arisen over the past few years.

2. The Commission should determine that facilities-based VoIP services are subject to state jurisdiction

In several of its prior comments to the Commission, the MDTC has offered numerous policy and legal arguments for why states should and do have regulatory authority over facilities-

²⁰ See e.g., MDTC Comments Attachment 2, Letter from Stacey L. Parker, Senior Director, Regulatory Affairs, Comcast, to Michael A. Isenberg, Director, Competition Division, Massachusetts Department of Telecommunications and Cable, at 3 (May 12, 2008) ("*Comcast May 12 Letter*"); MDTC Comments Attachment 2, Letter from John L. Conroy, Vice President, Regulatory Massachusetts, Verizon, to Michael A. Isenberg, Director, Competition Division, Massachusetts Department of Telecommunications and Cable, at 3 (Aug. 19, 2009) ("*Verizon Aug. 19 Letter*").

²¹ See e.g., Comcast May 12 Letter, at 3; Verizon Aug. 19 Letter, at 2-3.

²² See Wireline Competition Bureau, *In the Matter of Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, WC Docket No. 09-134, Memorandum Opinion and Order, DA 09-2205 (rel. Oct. 9, 2009).

²³ *Id.* at ¶¶ 8, 10.

based VoIP services.²⁴ In addition to the reasons previously articulated, the MDTC believes that the Commission should expressly find that states have authority to regulate facilities-based VoIP services in order to avoid the inevitable separate systems of telephone regulation that will ensue, to the detriment of consumers.

There currently exists dual federal-state jurisdiction over traditional circuit switched telephone service within this country. Indeed, Congress has expressly provided that the Commission does not have jurisdiction over the “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier[.]”²⁵ As Lois Greisman, director of the Federal Trade Commission’s Division of Marketing Practices, aptly pointed out recently, such “[d]ual federal-state authority actually is more the norm than the exception,” downplaying concerns “that varying federal and state standards would be problematic.”²⁶ However, as industry transitions to an IP-based telephone system, state jurisdiction has been called into question by certain entities.²⁷

If, indeed, the Commission seeks to preempt state authority over IP-based communications, which the MDTC argues it should not, then there will be, at a minimum, at least two different regulatory treatments of residential landline telephone service based solely upon the technology used to deliver that service. In particular, residential consumers will be

²⁴ *See supra* at n.4.

²⁵ 47 U.S.C. § 152(b)(1). The MDTC recognizes that there are certain exceptions to this but does not address them here.

²⁶ “Prepaid Calling Card Bill Prompts Debate Over Preempting States, Added FTC Authority,” *Telecommunications Reports Daily*, Dec. 3, 2009 (reporting on December 3 hearing on HR 3993). Additional information with regard to this hearing is available at: http://energycommerce.house.gov/index.php?option=com_content&view=article&id=1843:hr-3993-the-calling-card-consumer-protection-act&catid=129:subcommittee-on-commerce-trade-and-consumer-protection&Itemid=70 (last viewed Dec. 21, 2009).

²⁷ *See supra* at 5-6.

afforded differing protections simply by virtue of either the telephone provider they choose or the geographical location in which they happen to live. The Commission needs to carefully consider the potential consequences to consumers that may result from such an unworkable regulatory framework.

3. The Commission needs to ensure that consumers are made aware of any regulatory implications or loss of protections if they switch from a circuit-switched to an IP-based telephone service

Prior to making a final determination on the regulatory and jurisdictional treatment of facilities-based VoIP, the Commission also needs to impart certain consumer information and disclosure rules on carriers that provide IP-based telephone service. In particular, the Commission should require written notification to consumers of potential loss of certain regulatory protections should they choose to adopt, or their telephone provider chooses to transition to, an IP-based telephone service.²⁸ As discussed above, certain providers already assert that states do not have regulatory authority over facilities-based VoIP services.²⁹ It is unclear if those same providers informed, or will inform, their customers of the purported lack of state oversight or loss of certain protections. For instance, when Comcast Phone of Massachusetts discontinued its circuit-switched Digital Phone product within the state, the discontinuance notification letters provided to consumers by the company offered the option to switch to their facilities-based VoIP product called Comcast Digital Voice.³⁰ The notification letters made no mention of any change in regulatory status or protections with the new service.³¹

²⁸ By necessity, the Commission may also need to revisit its discontinuance rules for this purpose.

²⁹ See *supra* at 5-6.

³⁰ See Sample Customer Notification Letter of Comcast Phone of Massachusetts, Inc., *In the Matter of Section 63.71 Application of Comcast Phone of Massachusetts, Inc. and Comcast Phone of New Hampshire, LLC, for Authority Pursuant to Section 214 of the Communications Act to Discontinue the Provision of Comcast Digital Phone Telecommunications Service in Massachusetts and New Hampshire*, WC Docket No. 08-45, at Attachment 1

III. CONCLUSION

In summary, the MDTC supports the Commission's efforts to determine the appropriate policy issues concerning the industry transition from circuit-switched to IP-based technology. One crucial issue for state commissions is the regulatory and jurisdictional treatment of facilities-based VoIP services. Until the Commission makes a final classification decision on interconnected VoIP services, and finds that states have authority over these services, it should reaffirm that states have regulatory authority over facilities-based VoIP services. In addition, the Commission needs to consider the consumer implications of separate regulatory systems over like services (i.e., circuit-switched versus VoIP telephone service) and require provider notification to consumers of any loss of protections or change in regulatory status.

Respectfully submitted,

/s/
Geoffrey G. Why
Commissioner
Massachusetts Department of
Telecommunications and Cable

of Application (filed Feb. 20, 2008). Please note that this citation serves only as an example and is not meant to single out a particular carrier.

³¹ *Id.*